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04. May. 2023

INTERNATIONAL DECISIONS

EDITED BY DAVID P. STEWART

International criminal law—Rome Statute—command responsibility—crimes against humanity—war crimes—rape—pillage—evidence

PROSECUTOR v. BEMBA. Case No. ICC-01/05-01/08. Judgment Pursuant to Article 74 of the Statute. *At* https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF.
International Criminal Court, March 21, 2016.

On March 21, 2016, Trial Chamber III of the International Criminal Court (ICC or Court) issued the fourth judgment in the Court's fourteen-year lifetime, convicting Jean-Pierre Bemba Gombo of three counts of war crimes (murder, rape, and pillage) and two counts of crimes against humanity (murder and rape).[1] The judgment clarifies the precise scope of the responsibility of commanders for the acts of their subordinates under Article 28 of the Rome Statute of the International Criminal Court,[2] and encompasses a range of notable findings on sexual violence and pillage in times of armed conflict. The judgment is also likely to be instrumental in deciding on evidentiary issues that will arise in future cases before the ICC and other international courts, as well as national courts trying international crimes.

Bemba, a national of the Democratic Republic of the Congo (DRC), was serving as a member of the Senate of that country when he was arrested in 2008. In 1998, he had founded the Mouvement de libération du Congo (MLC), a rebel group aimed at overthrowing the Kinshasa government that subsequently became an established political party in the DRC. At the time relevant to the charges, Bemba was both president of the MLC political party and commander in chief of its military wing, the Armée de libération du Congo (para. 1). In 2002, in response to a request from President Ange-Félix Patassé of the Central African Republic (CAR), Bemba had deployed Liberation Army members from the DRC to the CAR to assist troops supporting Patassé in his fight against a coup d'état (paras. 379–80).

The situation in the CAR was referred to the ICC in 2004 by its new government, which asked the Office of the Prosecutor to investigate alleged crimes committed on the territory of the state during 2002 and 2003.[3] The prosecutor launched a full investigation in 2007. After his arrest in Belgium in July 2008, Bemba was charged with crimes against humanity and war crimes as a perpetrator, pursuant to Article 25(3)(a) of the Rome Statute. At the hearing on

[1] Prosecutor v. Bemba, Case No. ICC-01/05-01/08-3343, Judgment Pursuant to Article 74 of the Statute (Mar. 21, 2016), *at* https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF [hereinafter Judgment]. Decisions and documents of the Court cited herein are available online at its website, http://www.icc-cpi.int.

[2] Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 3 [hereinafter Rome Statute].

[3] Situation in the Central African Republic, Case No. ICC-01/05-1, Decision Assigning the Situation in the Central African Republic to Pre-trial Chamber III (Jan. 19, 2005), *at* https://www.icc-cpi.int/CourtRecords/CR2007_03762.PDF.

confirmation of the charges in March 2009, the pretrial chamber asked the prosecutor to consider whether command responsibility under Article 28 might be a more suitable mode of liability (paras. 5–6). In June 2009, the pretrial chamber confirmed the availability of sufficient evidence to establish substantial grounds to believe that Bemba was responsible, as a person effectively acting as a military commander, for the crimes against humanity of rape and murder and the war crimes of murder, rape, and pillage allegedly committed by MLC troops on the territory of the CAR between October 2002 and March 2003.[4] The trial began in November 2010 (paras. 7–10).

Article 28 establishes liability of military commanders, or other superiors exercising effective authority and control, for the crimes committed by their subordinates where they knew or should have known of those crimes and failed to prevent or repress them. The chamber understood the term "repress" as encompassing a duty to punish the perpetrators (paras. 205–06). To prove criminal responsibility under Article 28, the chamber needed to be satisfied beyond reasonable doubt of five elements: first, that Bemba had acted in effect as military commander; second, that forces under his effective command and control had committed crimes within the jurisdiction of the Court; third, that there was a causal link between his failure to act and the commission of those crimes; fourth, that he knew or had reason to know that the subordinates were committing or about to commit those crimes; and last, that he had failed to take all necessary and reasonable measures within his power to prevent or impose punishment for those crimes. The chamber found that command responsibility under Article 28 represented a sui generis mode of liability (paras. 170–74).

As this was the first judgment issued by the ICC under Article 28, the chamber had the opportunity to expound on each of the elements of this mode of liability. Turning first to the establishment of the status of the accused as effectively acting as military commander, the chamber noted that such status is not predicated on his having carried out exclusively military functions. The imposition of criminal responsibility applies at every level of the chain of command; it is strictly limited neither to the perpetrators' immediate superiors, nor to the highest-level leaders of the command (paras. 177–79).

Intrinsically linked to the status of the accused as effectively acting as military commander is the second element, whether he exercised either effective command and control or effective authority and control over the subordinates who committed the crimes. The chamber distinguished the closely related concepts of "authority" and "command," referring to the former as the power to give orders and enforce obedience, and to the latter as authority, particularly over armed forces. Nevertheless, it emphasized that whether an accused's power was best classified as "command" or "authority" did not bear substantially on meeting the threshold established in Article 28, but rather illustrated how control over subordinates was exercised (paras. 180–81).[5] Factors indicating such control include the power to issue orders, the capacity to ensure compliance with orders, the ability to re-subordinate units or change the command structure, control over finances, the capacity to move troops from one area to another, the capacity to enter into external negotiations on behalf of the group, and the ability to promote or demote

[4] Prosecutor v. Bemba, Case No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor (June 15, 2009), *at* https://www.icc-cpi.int/CourtRecords/CR2009_04528.PDF [hereinafter Confirmation of the Charges] (reported by Johan D. van der Vyer at 104 AJIL 241 (2010)).

[5] Citing Confirmation of the Charges, *supra* note 4, paras. 412–13.

individuals. There is no need to show that the commander exercised control to the exclusion of all others, but if another enjoyed exclusive authority, the requisite level of control may well be missing (paras. 185, 188–90).

In establishing that MLC troops under Bemba's control had committed crimes within the jurisdiction of the Court, witnesses' testimonies that the perpetrators spoke the Lingala language, wore particular types of uniform, and were present in certain areas exclusively controlled by MLC forces were crucial (paras. 626–28, 638, 642). Whereas one of these elements, taken alone, may not have sufficed to identify the perpetrators, the cumulative effect of the evidence satisfied the chamber beyond reasonable doubt that the troops were MLC forces (paras. 240–44).

Article 28 establishes a causal link between the crimes and the commander's failure to exercise control, by stating that the commander will be responsible for crimes committed by forces under his or her control "as a result of his or her failure to exercise control properly over such forces."[6] The chamber found that this link would be proven "when it is established that the crimes would not have been committed . . . had the commander exercised control properly" (para. 213). Judge Ozaki, noting different possible readings from the six official translations of the Rome Statute, agreed with this interpretation, linking it to the key principle of criminal law that there must be a personal link to the crime for liability to attach.[7]

Judge Steiner, in her separate opinion, noted that the nexus between the commission of the crimes and the commander's failure to exercise control properly applies, regardless of whether the superior is alleged to have failed to prevent or punish, or to submit the matter to the relevant authorities. But she also appeared to suggest that the nexus is to the commission of the crimes for an alleged failure to prevent, and to criminal liability in cases of an alleged failure to punish or submit the matter to competent authorities. To this end, Judge Steiner noted that "the causality requirement between the failure of the general duty to exercise control properly and the crimes still persists in circumstances *where the attribution of liability* rests solely on the commander's failure to repress the crimes—when understood as 'punish'—or to submit the matter to the competent authorities."[8]

Judge Ozaki's separate opinion on this point, by contrast, argued that the commander's duty to exert control properly should be read more holistically, and that the duties of effective supervision and discipline are part of the ongoing functions of effective command and control. That is, the duties to prevent or suppress the crimes, or submit their commission or its possibility to the relevant authorities for investigation, do not simply apply once the commander is aware that subordinates have engaged or are about to engage in such activities. Instead, "the duty to exercise control properly—including, as appropriate, to put effective systems of supervision and discipline in place—to which the nexus requirement attaches, is operative before the point in time when the forces are committing or about to commit the crimes."[9]

[6] Rome Statute, *supra* note 2, Art. 28(a), (b).

[7] Judgment, Separate Opinion of Judge Kuniko Ozaki, ICC-01/05-01/08-3343-AnxII, paras. 9, 11[hereinafter Ozaki, J., sep. op.], *at* http://www.icc-cpi.int (search for "ICC-01/05-01/08-3343," then follow hyperlink to Judgment) [hereinafter Links Page].

[8] Judgment, Separate Opinion of Judge Sylvia Steiner, ICC-01/05-01/08-3343-AnxI, para. 14 (emphasis added), *at* Links Page, *supra* note 7.

[9] Ozaki, J., sep. op., *supra* note 7, para. 17.

The next element to be proven in command responsibility cases is whether the commander knew or had reason to know of the crimes of his or her subordinates. In September 2012, the chamber issued a notification under Regulation 55 of the ICC Regulations of the Court,[10] notifying the parties that it might consider the alternate form of "knowledge" under Article 28 of the Statute—whether Bemba "had reason to know," as opposed to actually "knew," of the alleged crimes of his subordinates (para. 11). Ultimately, however, the chamber concluded that Bemba had had actual knowledge of the crimes committed by MLC forces, and thus recharacterization under Regulation 55 was unnecessary. It based this determination on such factors as Bemba's position; the channels of communication and regular contact between Bemba and officials in the CAR; and intelligence reports by nongovernmental organizations (NGOs), the media, and the MLC (para. 717). Therefore, the legal characterization of the charges did not need to be amended so as to examine whether the accused "should have known" of these crimes.

The inference of knowledge from NGO reports and Bemba's response to them is notable. In 2003, the International Federation for Human Rights issued a report based on its investigations in the CAR, where it highlighted that MLC troops had been committing the crimes of rape, pillage, and murder. Bemba initially responded to the report in the local press by accusing the federation of making political allegations, but he later wrote to its president assuring him that prosecutions would take place. The president responded by noting the prosecutions of low-ranking Liberation Army soldiers for pillage but expressed some concerns about the scope and legitimacy of those proceedings. He further encouraged Bemba to cooperate fully with the ICC, and to transfer any information at his disposal to the Court (paras. 607–11). From this evidence, the chamber was able to infer that Bemba did know of the alleged crimes of his subordinates and, despite being told of the insufficiency of his response, refused to carry out more effective measures to punish those crimes or cooperate with the competent authorities.

The chamber examined Article 28's requirement that the commander must have failed "to take all necessary measures" to prevent or repress the commission of the crimes, or to submit their commission to the competent authorities for investigation and prosecution. It found that failure to discharge any of these three duties could result in criminal liability and, following the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia on this point,[11] noted that the failure to prevent the crimes, when the commander was in a position to do so, could not be remedied by the subsequent punishment of the subordinates (paras. 197–209). Various measures that responsible commanders could take included ensuring the provision of adequate training in international humanitarian law, taking disciplinary measures, issuing orders prohibiting the commission of crimes, postponing military operations, suspending or redeploying violent subordinates, and insisting to a superior authority that immediate action should be taken (paras. 203–04).

To this end, and others, the chamber found that Bemba himself could have withdrawn MLC troops from the CAR; commenced genuine investigations into the commission of crimes; issued orders to commanders in the CAR to prevent the commission of crimes; ensured that

[10] Regulations of the Court, May 26, 2004, *as amended*, ICC-BD/01-03-11 (Nov. 2, 2011).

[11] Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Judgment, para. 83 (July 29, 2004); Prosecutor v. Orić, Case No. IT-03-68-T, para. 326 (June 30, 2006). These cases and those cited *infra* at notes 13–14 are available at http://www.icty.org.

troops received adequate payment and rations to prevent them from resorting to "self-compensation" through pillage and rape; ensured that troops be properly trained in international humanitarian law; removed, replaced, or dismissed soldiers known to have committed crimes; and shared information with prosecuting authorities and supported the investigation of criminal allegations (paras. 729–33, 739). Instead, the steps initiated by Bemba—the issuance of generalized, public warnings to troops to respect civilians; the trial of seven low-ranking soldiers on charges of pillage; and the creation of two investigative commissions, which were limited to allegations of pillage over a limited temporal and geographic scope, and a mission of inquiry, which interviewed only a small number of persons (with armed MLC guards present during the interviews)—did not constitute sufficient evidence that he had taken all measures within his power as required under Article 28. He was found to have made no effort to investigate or prosecute matters himself, to refer cases to the competent national authorities, or to cooperate with the international efforts to investigate the crimes (paras. 719–20, 733).

As regards sexual violence, the judgment recounts horrific accounts of the rape of girls as young as ten years old (para. 516), male rape (paras. 494, 498), and gang rape (paras. 465, 491, 548, 551). The chamber clarified that a victim's lack of consent does not need to be proven beyond reasonable doubt; where force, threat of force or coercion, or taking advantage of a coercive environment can be proven, the prosecution does not need to establish the victim's lack of consent (paras. 105–06).

The chamber observed that lack of consent by property owners is a necessary element of the war crime of pillage. It found that pillage requires the large-scale appropriation of property and, given that Article 8(2)(e)(v) of the Rome Statute refers to the pillaging of "a town or place," the "pillaging of a single house would not suffice" (para. 117). Article 8(2)(e)(v) includes a unique requirement that the property must have been appropriated for "private or personal use" (para. 118). The chamber found that, owing to the disjunctive wording ("private *or* personal use"), this element does not require that the perpetrator personally intended to use the pillaged items. Where the prosecution can show that property was appropriated for private or personal use, it is not obliged to disprove that the appropriation of property could be justified by military necessity (paras. 120, 124).

Bemba was sentenced to eighteen years' imprisonment in June 2016.[12]

* * * *

The *Bemba* judgment marks a turning point in the ICC's history, as the first conviction of a military commander for the crimes of his subordinates. As such, the judgment offers some welcome clarification of outstanding issues on this mode of liability. First, it confirms that command responsibility represents a sui generis mode of liability, by which commanders are found to be criminally responsible for the acts of their subordinates. Considerable debate had arisen as to whether command responsibility imposes criminal liability on superiors for failing to prevent or exact punishment for the crimes of their subordinates, or whether that failure renders superiors responsible for the crimes committed by their subordinates.[13] Importantly, the chamber confirmed that the latter is the proper interpretation of the nature of command

[12] Prosecutor v. Bemba, Case No. ICC-01/05-01/08-3399, Decision on Sentence Pursuant to Article 76 of the Statute (June 21, 2016), *at* https://www.icc-cpi.int/CourtRecords/CR2016_04476.PDF.

[13] Prosecutor v. Halilović, Case No. IT-01-48-T, paras. 42–54 (Nov. 16, 2005).

responsibility, finding support for this position in the wording of Article 28, which states that liability under that provision is "[i]n addition to other grounds of criminal responsibility under this Statute" and that superiors "shall be criminally responsible *for* crimes" committed by their subordinates (para. 173).

Second, it confirms that command responsibility can attach to any person exercising effective control over subordinates, wherever their place in the chain of command (para. 179). Last, it establishes the precise nature of the causal link required under Article 28, clarifying that the failure in command must be linked to the commission of the crimes (paras. 210–13). This causal element is unique in the ICC's statutory framework; other international criminal tribunals have not found a requirement of causation for superior responsibility.[14] It has been debated whether this causal element attaches to the criminal responsibility of the commander or to the commission of the crime—whether the term "as a result of" relates to the commander's being criminally responsible as a result of his or her failure to exercise adequate control,[15] or whether command responsibility attaches where crimes have been committed as a result of the commander's omission.[16] The chamber confirmed that the latter interpretation is correct, and it applied a "but for" standard in finding that liability will attach "when it is established that the crimes would not have been committed . . . had the commander exercised control properly" (para. 213). This threshold is higher than that set out in the decision on confirmation of the charges, which required only that the commander's omission "increased the risk of the commission of the crimes charged."[17] The chamber noted that a "but for" standard was not required under the Rome Statute but deemed it desirable for the purposes of consistent and objective application (paras. 212–13).

Although this causal link may be obvious in case of failure to prevent the crimes committed, it is less clear if the commander allegedly failed to impose punishment for (or "repress," in the words of Article 28) those crimes that have already taken place, or to submit their commission to the competent authorities for investigation and prosecution. The judgment rather sidesteps this difficult issue. Still, some illustration of how the causal element might arise from failure to punish can be found in the concluding pages of the judgment, which refer to a "climate of acquiescence" created when Bemba, inter alia, failed to refer the crimes to the appropriate authorities (para. 738). Relatedly, Judge Ozaki's holistic view of the commander's role, which incorporates having systems in place to punish wrongdoing effectively, establishes that the commander's duties to both prevent and exact punishment for the crimes of subordinates should not be viewed as wholly distinct from each other.

Significantly, Bemba spent much of the period relevant to the charges in a different country than the MLC troops; while they were stationed in the CAR, he remained in the DRC. The judgment emphasizes, however, that commanders cannot claim ignorance of the acts of their subordinates, and that the duty to ensure compliance with international

[14] Prosecutor v. Delalić, Case No. IT-96-21-T, paras. 396-400 (Nov. 16, 1998).

[15] *See* Amnesty International, Amicus Curiae Observations on Superior Responsibility Submitted Pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/05-01/08-406 (Apr. 20, 2009), *at* https://www.icc-cpi.int/pages/record.aspx?uri=669669 (making this argument).

[16] *See* GUÉNAËL METTRAUX, THE LAW OF COMMAND RESPONSIBILITY 33, 82–89 (2009).

[17] Confirmation of the Charges, *supra* note 4, para. 425.

humanitarian law[18] remains, even when commanders are geographically distant from their troops. The judgment usefully illustrates the kinds of measures that are expected of responsible commanders in preventing their subordinates from committing crimes, in addressing situations where crimes have been committed by subordinates, and in seeking effective punishment for those crimes.

The findings on rape are particularly noteworthy and again represent a first for the ICC, insofar as this is the Court's first conviction for crimes of sexual violence. The ICC was criticized in its early years for the prosecutor's failure to charge individuals with rape and other forms of sexual violence, where clear evidence suggested that those crimes had been committed.[19] The judgment not only sensitively and completely outlines the suffering inflicted on the victims who testified before the chamber, but also acknowledges the long-term effects of these crimes, including HIV, post-traumatic stress disorder, ongoing medical issues, depression, and isolation caused by the resulting stigma. Notably, the Court acknowledges the gender-neutral language of its Statute and enters a conviction of rape committed against male victims as rape, and not as torture, cruel or inhuman treatment, or outrages upon personal dignity, as was typically charged before other international criminal tribunals.[20]

The chamber's findings on pillage expand on the more controversial aspects of Article 8(2)(e)(v) of the Rome Statute, such as the requirements that the pillage be of a town or place and for private or personal use, elements that are largely accepted as not being required under customary international law. The finding that an absence of military necessity is not required for the crime of pillage appears to run contrary to the principle of *in dubio pro reo* established in Article 22(2) of the Statute: where there is any ambiguity on the definition of a crime, the interpretation that favors the accused should be adopted. The defense supported its assertion that an absence of military necessity was required with reference to footnote 61 of the Elements of Crimes, which states that "[a]s indicated by the use of the term 'private or personal use', appropriations justified by military necessity cannot constitute the crime of pillaging."[21] That statement seems to suggest that appropriations justified by military necessity (for example, the appropriation of food to sustain hungry soldiers) could not constitute pillage. Nevertheless, the chamber found that there was no need to prove the absence of military necessity.

Last, the reliance on the report of the International Federation for Human Rights and the response of Bemba in establishing his knowledge of the crimes highlights a clear role for civil society. NGOs and other organizations working in regions where atrocities are committed would be well-advised, following this judgment, to continue to document

[18] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 87(2), June 8, 1977, 1125 UNTS 3 (establishing this duty, among other instruments).

[19] *See* Diane Marie Amann, Case Report: Prosecutor v. Lubanga, 106 AJIL 809, 812 (2012).

[20] See further Sandesh Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, 18 EUR. J. INT'L L. 253 (2007); Niamh Hayes, *The* Bemba *Trial Judgement—A Memorable Day for the Prosecution of Sexual Violence by the ICC*, PHD STUDIES IN HUMAN RIGHTS (Mar. 21, 2016, 6:32 PM GMT), *at* http://humanrights doctorate.blogspot.com.

[21] Elements of Crimes, Art. 8(2)(e)(v), para. 2 n.61, ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, OFFICIAL RECORDS, FIRST SESSION, at 150, UN Doc. ICC-ASP/1/3 & Corr.1, UN Sales No. E.03.V2 (2002).

crimes in detail, and to put their allegations to the respective political and military leaders who have the power to stop those crimes and/or refer them to prosecuting authorities. Even if those leaders claim that they will take action to hold the individual perpetrators to account but fail to do so, this judgment stresses that they cannot later claim ignorance of the scope of their subordinates' crimes. To this end, the judgment heralds a new framework for concerted action between activism and prosecution in the fight against impunity.

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Caribbean Community—Revised Treaty of Chaguaramas—freedom of movement under Community law—indirect and direct effect of international law—LGBT rights

TOMLINSON v. BELIZE; TOMLINSON v. TRINIDAD AND TOBAGO. [2016] CCJ 1 (OJ). *At* http://www.caribbeancourtofjustice.org.
Caribbean Court of Justice, June 10, 2016.

On June 10, 2016, the Caribbean Court of Justice (Court or CCJ) rejected a claim that the Immigration Acts of Belize and Trinidad and Tobago, both of which contain express provisions banning the entry of homosexuals into those two countries, violate the right to free movement of individuals within the Caribbean Community (CARICOM or Community).[1] Absent any evidence that those laws had in fact been applied to exclude CARICOM nationals from entering their own countries on the basis of their sexual orientation, the Court declined to find a violation of Community law. At the same time, the Court ruled that CARICOM law requires member states to admit homosexuals from other CARICOM states, and that Belize and Trinidad and Tobago may therefore not indefinitely retain legislation that appears to conflict with their obligations under Community law. The decision endorses the principle of nondiscrimination on the basis of sexual orientation, recognizes the principle of free movement within CARICOM, and clarifies the principle of direct applicability of Community law in the legal systems of CARICOM member states.

The free movement of individuals within CARICOM is regulated by the Revised Treaty of Chaguaramas (RTC).[2] Article 7 of that treaty prohibits discrimination on the grounds of nationality; Article 45 establishes that member states must commit themselves to the goal of free movement of their nationals within the Community; and Article 46 requires member states to allow skilled Community nationals to enter other CARICOM member states to seek employment. These obligations are supplemented by the 2007 decision of the Conference of the Heads of Government of CARICOM (2007 decision), which confers upon all CARICOM

[1] Tomlinson v. Belize; Tomlinson v. Trinidad and Tobago, [2016] CCJ 1 (Original Jurisdiction) (Caribbean Ct. Justice June 10, 2016). The Court's opinions cited herein are available at http://www.caribbeancourtofjustice.org.

[2] CARICOM, the Caribbean Community, was created in 1973 by the Treaty Establishing the Caribbean Community and its annex, The Caribbean Common Market, July 4, 1973, 946 UNTS 17, known as the Treaty of Chaguaramas. That treaty was replaced in 2001 by the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, July 5, 2001, 2259 UNTS 293. Both treaties are available at http://www.caricom.org.